UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NICHOLE McDANIEL and LESSIE DAVIES, both individually and on behalf of class of individuals similarly situated, Plaintiffs, v. THE COUNTY OF SCHENECTADY, *et. al.,* Defendants.	:	No. 04-CV-0757 (GLS/RFT)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Dated: August 18, 2006

ATTORNEYS FOR PLAINTIFFS AND THE PROPOSED CLASS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

I. INTRODUCTION

Plaintiff Lessie Davies filed the above-captioned class action lawsuits against Defendants Harry Bufardi, Gordon Pollard, and Robert Elwell, alleging that Defendants had violated her Constitutional rights under color of state law by illegally strip searching her, and others similarly situated, upon admission into the Schenectady County Jail, and that Defendants maintained an unconstitutional policy of strip searching all pre-trial detainees who were admitted into the Schenectady County Jail absent any particularized suspicion that they possessed weapons or other contraband.

Substantial settlement negotiations have taken place between the Parties, including a mediation conducted by Magistrate Judge Treece, and, as a result, the parties have reached a Settlement Agreement, which was executed on July 31, 2006. Plaintiffs now move for preliminary approval of the settlement. Accordingly, at this preliminary stage of the settlement process, Plaintiffs respectfully request that the Court: (i) grant preliminary approval of the proposed settlement; (ii) certify the Settlement Class pursuant to the provisions of Fed. R. Civ. P. 23(b)(3); (iii) schedule a fairness hearing to consider final approval of the settlement; (iv) direct that notice of the proposed settlement and final approval hearing be provided to absent class members in a manner consistent with the Settlement Agreement and the Notice Plan, and in the form and content substantially as set forth in the Settlement Agreement; and (v) enter the proposed Order for Preliminary Approval filed contemporaneously herewith, a copy of which is also Exhibit D to the Settlement Agreement.

II. PROCEDURAL HISTORY

Plaintiff filed this lawsuit on June 29, 2004. Discovery commenced, with the Plaintiffs

taking the depositions of Defendant County of Schenectady, pursuant to F.R.C.P. 30(b)(6), and Schenectady County correction officers Jerry Carlos, Michele Bergeron, Sherri Crandall, Judith Eldred, and Dean Harper. Defendants deposed Ms. Davies. The Plaintiffs also obtained hundreds of pages of documentary discovery, including numerous internal policies and procedures of the Schenectady County Jail. Discovery in the case was extremely contentious, with several disputes requiring the intervention of Magistrate Treece. Those included the Plaintiff's right to informally speak with individual corrections officers (docket entries 9-10, 13), the Plaintiff's access to the SCJ for an inspection and the right to obtain production of the SCJ booking sheets (docket entries 18-24), and the applicability of the work-product privilege to the conversations between Plaintiff's counsel and non-party witnesses (docket entries 28, 30). These disputes and others required numerous discovery conferences before Magistrate Treece, with several disputes being appealed to this Court pursuant to F.R.C.P. 72. Defendants moved for partial summary judgment, based on the applicability of the Prison Litigation Reform Act (PLRA) to this case. That motion was denied. (Docket entry 77). Defendants' application for permission to file an immediate appeal of that decision to the Second Circuit was pending at the time the parties reached an agreement in principle to settle the case on a class-wide basis. The negotiation process was facilitated by a settlement conference before Magistrate Treece on May 17, 2005 that led to the parties ultimately reaching an agreement.

III. THE SETTLEMENT AGREEMENT

The settlement agreement, signed on July 31, 2006, (exhibit 1 to Rozger affirmation) provides that the Defendants will create a fund to compensate the settlement class members for the violation of their Constitutional rights. The Settlement Class is defined as follows:

All persons who were placed into the custody of the Schenectady County Jail during

> the period June 29, 2001, through and including June 29, 2005, after being charged with misdemeanors, violations, traffic violations, violations of probation or parole, or held on civil matters, and were strip searched upon their entry into the Jail. Specifically excluded from the class are Defendants and any and all of their respective affiliates, legal representatives, heirs, successors, employees or assignees.

The size of the Settlement Class is approximately 5,500 persons[1]. The Settlement Agreement calls for the creation of a Settlement Fund totaling two million, five hundred thousand dollars ($2,500,000.) That amount is allocated as follows: approximately $1,750,000 for distribution to class members, $650,000 in attorney's fees, $13,500 in incentive awards for the named and proposed named Plaintiffs, and approximately $86,500 in notice and administration costs. Each Settlement Class member who makes a claim will receive a *pro rata* share of the $1,750,000 distribution amount, with the entire distribution amount to be distributed to the class.

In addition, the settlement agreement provides that the Defendants will change their strip search policy so that individuals being booked into the Schenectady County Jail will not be strip-searched absent reasonable suspicion that such individual is secreting weapons or contraband. This represents a clear victory for the class, and will benefit any other individual who will enter the SCJ in the future. The revised policy, which is annexed as Exhibit G to the proposed Settlement Agreement, is a detailed, workable policy that provides ample guidance for SCJ correction officers. It provides, *inter alia*, that a strip search upon admission will only take place if there is reasonable, individual suspicion that the arresstee is concealing contraband, and that the officer performing the search must first obtain authorization for the search from the Unit Supervisor, and must document the reasons for, and results of, the strip search on a standardized form. The implementation of this

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[1]This estimate is based on the Sheriff's Annual Report of the population of the SCJ for the years 2001 - 2004. (Exhibit 2). This number may overstate the class size, since it may include individuals who were admitted into the SCJ more than once.

policy will ensure that the admissions process at the SCJ will comport with Constitutional standards, and is the fulfillment of a major purpose of this lawsuit.

Plaintiffs' Class Counsel respectfully submit that the terms of this settlement are fair, adequate, and reasonable for the Settlement Class and that the requirements for final approval will be satisfied. In considering preliminary approval, however, the only issue before the Court is whether the proposed settlement is within the range of what may be found to be fair, adequate, and reasonable, so that class members can be notified of the proposed settlement and a fairness hearing can be scheduled. Only after class members and others have had an opportunity to receive notice and present supporting or opposing evidence at a formal fairness hearing will the Court be called upon to render a final judgment regarding the fairness of the proposed settlement.

Once the Court has ruled on the motion for preliminary approval, the deadlines for providing notice, opting out of the Settlement Class, and submitting claims will begin to run. The schedule set forth below, which is subject to the timing of actions to be taken by the parties and the Court in this case, provides the Court with an approximate time line of the various steps in the settlement approval process under the Settlement Agreement.

Notice Date: not later than 30 days after Preliminary Settlement Approval date

Deadline for filing Objections: 90 days after Notice Date

Deadline for filing an Opt-out notice: 90 days after Notice Date

Deadline for filing a Claim: 120 days after Notice Date

Final Fairness Hearing: As determined by the Court.

IV. ARGUMENT

A. THE CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS UNDER FED. R. CIV. P. 23 IS APPROPRIATE

The benefits of the proposed Settlement can be realized only through the certification of a settlement class. The Supreme Court of the United States has emphatically confirmed the viability of such settlement classes. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). So, too, have the federal appeals courts. *See e.g., In re Prudential Ins. Co. Of Am. Sales Practices Litig.,* 148 F.3d 283 (3d Cir. 1998), cert. denied, 119 S. Ct. 890 (1999) ("Prudential II"); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011 (9th Cir. 1998). The use of such settlement classes, where the parties have engaged in and concluded settlement negotiations prior to class certification and notice, has been clearly approved by this Circuit, *Weinberger v. Kendrick,* 698 F.2d 61 (2d Cir. 1982), *cert denied,* 464 U.S. 818, 78 L.Ed.2d 89, 104 S.Ct. 77 (1983), so long as "district judges who decide to employ such a procedure... scrutinize the fairness of the settlement with even more than the usual care." *Id.,* at 73. *See also In re Prudential Securities Inc*., 163 F.R.D. 200, 205 (S.D.N.Y. 1995) ("tentative or temporary settlement classes are favored when there is little likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge,") (quoting *In re Beef Indust. Antitrust Lit.* 607 F.2d 167, 174 (5th Cir. 1979), *cert denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981)).

The proposed Settlement in this case readily meets the Rule 23(a) criteria of numerosity, commonality, typicality, and adequacy. Certification under Rule 23(b)(3) is appropriate for settlement of the class members' compensatory damages claims because all plaintiff's claims for compensatory relief are premised on the predominating common issues of the existence of a blanket strip search policy at the SCJ, and whether the County of Schenectady was responsible for that

policy. There is no danger that individual variations in the type or magnitude of damage suffered by individual class members will affect predominance, as the class representative as the same type of damages and seeks the same type of relief as the members of the proposed class. Moreover, resolution of this litigation by a class settlement is superior to individual adjudication of the class members' claims for compensatory relief. In particular, the proposed settlement provides the class members with an ability to obtain predictable, certain and defined compensatory relief promptly, and it contains well defined administrative procedures to assure due process of law to each individual class member, including the right to "opt out" of the settlement agreement. By contrast, individual litigation carries with it great uncertainty and costs, and is doubtful that many of the proposed class members would be able to vindicate their rights in an individual action, because of the risk of a minimal damage award and the costs of pursuing an individual case. A class-wide settlement would also relieve the judicial burden that would result from the repeated adjudication of the same issues in thousands of individual damages trials against Schenectady County. Indeed, for all of the above reasons, numerous other district courts have certified such class actions where the allegations were the same as in this case. *See, e.g., Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y. 2005); *Bynum v. District of Columbia*, 214 F.R.D. 27 (D.D.C. 2003); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y 2002); *Mack v. Suffolk Cty.* 191 F.R.D. 16 (D. Mass. 2000); *Kahler v. County of Rensselaer*, 03 CV 1324 (N.D.N.Y. Sept. 23, 2004).

1. The Elements of Rule 23(a) are Satisfied in the Present Case

Approval of the settlement class, at lease for purposes of notice, is appropriate, since the Plaintiffs can establish each of the four threshold requirements of Subsection (a) of the Rule, which provides:

One or more members of a class may sue or be sued as representative parties on

> behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). See, e.g., *Prudential, supra.* Here, all four elements easily are satisfied.

a. The Class Members are Sufficiently Numerous

Rule 23(a)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all members is impracticable." This rule does not impose a burden of demonstrating that joinder of all class members is "impossible." *Robideaux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("[i]mpracticable does not mean impossible"), *see also Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 63 (S.D. Ohio 1991) ("satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required.") There is no fixed minimum number of class members that will satisfy this requirement, but "[a] leading treatise concludes, based on an examination of prevailing precedent, that the difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable." *Robideaux*, at 937 (citing 1 Herbert B. Newberg, *Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels*, § 3.05, at 141-42).

In the present case, Defendants produced in the course of discovery documents detailing that during the proposed class period, approximately 5,500 non-felony detainees were booked into the SCJ. (Exhibit 2 to Rozger affirmation). Moreover, the proposed class here is likely to be chiefly comprised of economically and socially marginalized persons whose access to legal counsel and the court system is extremely limited. For these reasons, it is clear that joinder is impracticable, and it

is clear that the proposed class meets the numerosity requirement.

b. The Class Members Share Common Questions of Law and Fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The "commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997). "Rule 23 does not require that all questions of law or fact be common, it only requires that the common questions predominate over the individual questions." *Dura-Built Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 93 (S.D.N.Y.1981) Plaintiffs are not required to show that all class members claims are identical to each other, and any differences between the proposed class members, "while arguably relevant as defenses to liability, do not change the fact that this class action raises the same basic claim and shares common questions of law." *Mack v. Suffolk County,* 191 F.R.D. 16, 23 (D.Mass. 2000) (allowing certification of strip search class action despite "varying defenses to liability which may be raised regarding particular individuals"). Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *In re Agent Orange Product Liability Litigation,* 818 F.2d 145 (2d Cir. 1987). Plaintiffs are entitled to class certification where the class claims arise "from a common nucleus of operative fact regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants," *Haywood v. Barnes,* 109 F.R.D. 568, 577 (E.D.N.C. 1986).

Here, Plaintiffs have satisfied the requirement of commonality. They claim that they were illegally strip searched at the Schenectady County Jail pursuant to the Defendants' practice of strip-searching all individuals booked into the SCJ. Defendants deny such a practice, and maintain that all strip searches were conducted on a finding of reasonable suspicion. As such, this class action has two common issues that are of central importance to the claims of all class members: whether

the Schenectady County Jail employed a blanket strip search policy and/or practice during the class period, and whether Defendants Schenectady County are responsible for such Constitutional violations. These questions are the centerpiece of this litigation, and would be the focus of any trial in this matter. They have been the subject of extensive discovery already, and has, Plaintiffs contend, been confirmed by the 30(b)(6) deposition of Defendant County of Schenectady and the Schenectady County Jail's written policies. Class certification here is appropriate given these questions, even if there are some variations in circumstances amongst individual class members. *See Eddleman v. Jefferson Co., Kentucky,* 96 F.3d 1448 (Table), 1996 WL 495013, *4 1996 U.S. App. LEXIS 25298 (6th Cir. 1996) (commonality is present even where some class members "subject to a full strip search instead of a partial one, or the fact that some individuals may fail to meet the qualifications for the class because it can be shown that there was reasonable suspicion to search them … These isolated instances of non-commonality are not grounds for denying class certification") (Exhibit 3).

c. The Plaintiff's Claims are Typical of the Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . . of the class." The requirement of this subdivision of the rule, along with the adequacy of representation requirement set forth in subsection (a)(4), is designed to assure that the interests of unnamed class members will be protected adequately by the named class representative. *See, e.g., General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed. 2d 740 (1982). The measure of whether a plaintiff's claims are typical is whether the nature of the plaintiff's claims, judged from both a factual and a legal perspective, are such that in litigating his or her personal claims he or she reasonably can be expected to advance the interests of absent class members. *Id.* Common questions must predominate over individual questions. The Court must find

that "the group for which certification is sought seeks to remedy a common legal grievance." *Hochschuler v. G.D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978). Rule 23(b)(3) does not require that all questions of law or fact be common. "Thus, when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 723 (2nd Cir. 1983) (quoting 7A Wright & Miller, *Federal Practice and Procedure* § 1777 (1972)).

Here, Plaintiff raises common issues of fact and law that predominate over any individual issues that might arise. All of the proposed class members' legal claims revolve around one legal issue: is a policy of strip searching every pretrial detainee admitted to a county jail, without regard to the crime charged or circumstances of arrest, constitutional? Plaintiffs' claims also share a common factual issue - did such a practice exist, and was the defendant County responsible? These legal and factual issues predominate over any of the Plaintiffs' individual issues.

d. The Plaintiff and Her Counsel Will Fairly and Adequately Represent the Class

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the class." In this judicial circuit, "gauging the adequacy of representation requires an assessment whether the class representatives have interests antagonistic to those of the class they seek to represent, as well as an evaluation of the capabilities and qualifications of the class representative's counsel." *Dietrich v. Bauer,* 192 F.R.D. 119, 126 (S.D.N.Y. 2000). Both prerequisites of adequacy of representation are met in this case.

Plaintiff and the proposed class members have a uniform interest in ending illegal strip searches at the SCJ, and to obtaining appropriate compensation from Defendants. In nearly identical circumstances, and given the common legal and factual issues, courts have deemed plaintiffs in

similar cases to be adequate class representatives. *See, e.g., Kahler, supra; Marriot, supra; Eddleman, supra; Smith v. Montgomery Co.,* 573 F.Supp. 604 (D. Md. 1983) appeal dism., 740 F.2d 963 (4th Cir. 1984).

The class is also represented by competent counsel who are have extensive experience in both class action and civil rights litigation, including several other strip search class actions in this District. *See Marriott,* 228 F.R.D. 133, 172 (N.D.N.Y. 2005)*; Kahler, supra; Kelsey v. County of Schoharie,* 04 CV 0299. The firm resumes for each class counsel also attest to their experience and ability to represent the class. See exhibits 4-7 to Rozger affirmation. In short, the Plaintiffs are adequate representatives, and have retained experienced class counsel that have aggressively litigated this action. They have satisfied this requirement for certification.

2. The Elements of Rule 23(b)(3) Are Also Satisfied

a. Common Questions of Law and Fact Predominate

A class action may be maintained under Rule 23 (b)(3) if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair end efficient adjudication of the controversy." *Id*. "The Rule 23 predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod. v. Windsor,* 521 U.S. 591, 623 (1997). In order to meet the predominance requirement of Rule 23(b)(2), a plaintiff must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, … predominate over those issues that are subject to only individualized proof." *Visa Check,* 280 F.3d 136 (citation omitted). The most pragmatic way for the Court to make this determination is to evaluate whether "common proof will predominate at trial." *In Re NASDAQ Market Makers,* 169 F.R.D. 473, 517 (S.D.N.Y. 1996). *See also, Jenkins v. Raymark Indus.,* 782

F.2d 468, 472 (5th Cir. 1986) (the "significant aspect" requirement is met if "jury findings on the class questions … will … significantly advance the resolution of the underlying … cases"); *Dietrich,* 192 F.R.D. at 127 (in determining whether common issues of fact predominate, "a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class").

Here, all of the Plaintiff's legal claims revolve around one legal issue: is a policy of strip searching every pretrial detainee admitted to a county jail, without regard to the crime charged or circumstances of arrest, constitutional? Plaintiff's claims also share a common factual issue - did such a practice exist, and was the defendant County responsible? These issues, and not any of the Plaintiff's individual issues, were the subject of the long and contentious discovery process in this case, and surely would have been the subject of equally contentious motion practice had the case not resolved. These legal and factual issues accordingly predominate over all of the class members' individual issues.

b. A Class Action is the Superior Method of Adjudicating This Case

Finally, Rule 23(b)(3) requires that a class action suit provide the best way of managing and adjudicating the claims at issue. In this case, settlement on a class basis also is superior to individual litigation and adjudication because settlement provides class members with prompt compensation for their damages, whether those damages exist now or manifest themselves sometime in the future. By contrast, compensation resulting from litigation is highly uncertain and may not be received before lengthy trial and appellate proceedings are complete. In addition, the Settlement obviously removes the overwhelming and redundant costs of individual trials.

Accordingly, the Settlement Agreement renders a class action superior to other potential avenues of recovery for Plaintiffs and the Class. Therefore, this case presents the paradigmatic example of a dispute which can be resolved to effectuate the fundamental goals of Rule 23: (1) to

promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who might otherwise be economically precluded from doing so, the opportunity to assert their rights. Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1754. At the same time, the Settlement fully preserves the due process rights of each individual plaintiff seeking compensatory damages. In sum, the requirements of Rule 23(b)(3) are satisfied and certification of a the proposed class is appropriate.

B. THE SETTLEMENT AGREEMENT SHOULD BE GRANTED PRELIMINARILY APPROVAL BY THE COURT

At this stage, the Court is charged with determining whether the proposed Class Settlement is possibly fair, reasonable and adequate. The Court's function is "to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Prudential*, 163 F.R.D. at 209 (quoting *Amstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980)). The procedure of providing notice to the class followed by a hearing to consider approving a class settlement has been accepted by numerous courts and is now standard practice. *Prudential*, supra; *see also Bronson v. Board of Education of the City School District of the City of Cincinnati*, 604 F. Supp 68 (S.D. Ohio 1984).[2]

The *Manual for Complex Litigation, Third* (Federal Judicial Center 1995) §30.41, summarizes the recommended procedure that courts have articulated for the class action settlement approval process:

> A two step process is followed when considering class settlements. First, that court makes a preliminary evaluation of the fairness of the

[2]The Court in *Bronson* outlined the following procedure for preliminary approval of a settlement. "The court must preliminary approve the proposed settlement; then, members of the class must be given notice of the proposed settlement and after a hearing, the court must decide whether the proposed settlement is fair, reasonable and adequate." *Id.* at 71.

> settlement…If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

Authorizations to disseminate notice reflects a recognition by the Court that the settlement is in the range of possible approval; the ultimate Rule 23(e) determination is reserved pending the completion of the notice and initial opt-out process, so the Court can consider input from the class members who will be bound by the final approval Order. *See In re Baldwin-United Corporation,* 105 F.R.D. 475, 485 (S.D.N.Y. 1984) (court authorized provisional class certification and notice "without prejudice to the findings the Court will make after conducting the fairness hearing, at which time all objections or arguments in opposition to the proposed settlements will be heard and considered and proponents must discharge their burden to prove that the proposed settlement agreements are fair and reasonable"); *see also In re NASDAQ Market Makers Antitrust Litigation,* 1997 U.S. District LEXIS 20835, 94 Civ. 3996 (S.D.N.Y. December 31, 1997) (exhibit 8); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768 (3d Cir. 1995); *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195 (5th Cir. 1981); *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980).

Whether the settlement falls within the range of possible approval under Rule 23 turns upon whether there is a conceivable basis for presuming that the more rigorous standard applied for final approval will be satisfied. The standard for final approval of a settlement consists of showing that the settlement is "fair, reasonable and adequate," *Weinberger,* 698 F.2d at 73, considering "the complexity of the litigation, comparison of the proposed settlement with the likely result of litigation, experience of class counsel, scope of discovery preceding settlement, and the ability of

the defendant to satisfy a greater judgement," *In re: Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). In the absence of fraud, collusion or the like, the Court should not substitute its own judgment for that of counsel. *Weinberger, supra*; *see also Trief v. Dun & Bradstreet Corp.,* 840 F. Supp. 277, 281 (S.D.N.Y. 1993) ("absent evidence of fraud or overreaching [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel"); *In re Warner Communications Sec. Lit.,* 798 F.2d 35, 37 (2d Cir. 1986) ("it is not a district judge's job to dictate the terms of a class settlement"); *M. Berenson Co. v. Faneuil Hall Market Place, Inc.,* 671 F. Supp. 819, 822 (D. Mass 1987) ("[w]here, as here, a proposed settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") Preliminary approval is not a definitive final finding on the fairness of the proposed settlement, and permitting notice to members of the class does not mean that the Court has found the settlement to be fair, reasonable, and adequate for purposes of final approval. *See Holden v. Burlington Northern, Inc.,* 655 F.Supp. 1398 (D.Minn. 1987).

An initial analysis of the terms and features of the proposed class settlement of this case should give the Court confidence that it merits serious consideration by the class members, and that it will likely serve as the fair and comprehensive resolution of class members' claims. Preliminary approval requires a finding that the Settlement falls within the range of possible approval, meaning, primarily, that Settlement was reached as a result of arms-length negotiations and after sufficient discovery was conducted. Here, both those requirements are satisfied. Settlement negotiations, which included Class counsel, were extensive, adversarial, and were carried on for over a year - starting just before Magistrate Treece's May 17, 2005 settlement conference and continuing up until the agreement was executed by both parties on July 31, 2006. These negotiations were conducted by experienced and knowledgeable counsel, who had the benefit of extensive fact discovery from

both Plaintiffs and Defendants. Moreover, the Settlement was achieved only after over two years of intense adversarial litigation, with counsel for the Plaintiffs vigorously pursuing fact discovery and often obtaining the intervention of Magistrate Treece. The settlement was reached after extensive discovery revealed evidence which, Plaintiffs believe, would fully support the granting of preliminary injunction and class certification. Thus, the settlement was reached in a procedurally fair, arms-length manner.

It is also clear that the settlement is substantively fair. First of all, the settlement provides substantial injunctive relief to the class, in that the Defendants have agreed to implement a revised strip search policy at the SCJ that provides that such searches will only occur upon reasonable suspicion that the detainee is secreting contraband, and to train their correction officers about that revised policy. (Exhibit 1, p. 10-11). This will help insure that any class member who should enter the SCJ again will not have their Constitutional rights violated by an unlawful strip search.

In addition, it is clear that the monetary compensation to the class members here for the indignity of an unlawful strip search is fair and reasonable, given the inherent risks of litigation and given awards in similar cases. Since each class member who files a claim will receive a *pro rata* share of the settlement proceeds, what each claimant receives will depend on how many class members make claims. In similar strip search class action settlements, both in this District and nationwide, class members have filed claims at rates between 11 and 32%. *See Doan v. Watson,* 2002 WL 31730917, 2002 U.S. Dist. LEXIS 23333, No. 99-4-C-B/S (S.D.Ind. December 4, 2002) (619 of 2591 class members made claims, or 24%) (exhibit 9); *Eddleman v. Jefferson County,* 3:91 CV 144-J (W.D.KY.) (approximately 24% of class made claims) (exhibit 10); *McBean v. City of New York*, 233 F.R.D. 377, 381-82 (S.D.N.Y 2006) (4319 of 40,352 class members filed claims, or 11%); *Kahler v. County of Rensselaer,* 03CV1324 (32% of class members filed claims) (Rozger

affidavit, ¶ 11). If this case achieves the same 32% claims rate as in the *Kahler* case, approximately 1,760 individuals will share the $1,750,000 of the settlement allocated to paying claims, or about $994 each. If the rate of return is closer to the 24% rate achieved in the *Eddleman* or *Doan* cases, each class member filing a claim will receive approximately $1,326. Of course, it is not necessary at this time for the Court to determine what the ultimate claims rate in this case will be; all that is required is to determine whether the proposed settlement is fair enough to warrant going forward and notifying the proposed class. Since it is likely that class members here will receive at least $1,000 each, the proposed settlement is well within the range of fairness required to tentatively certify the class and send the class notice.

Indeed, numerous courts have approved, on motions for *final* approval, strip search class settlements for per-claimant amounts of the same or less than what is likely here. In the case of *Tyson, et. al. v. City of New York, et. al.*, 97 Civ. 3762 (S.D.N.Y.), a class action filed to address a blanket strip search policy in New York City jails, settling class members who did no more than file a claim (which is all class members are asked to do here) received a $250 payment. *See McBean, supra* at 389. In *McBean*, the court approved a strip search class settlement providing payments of approximately $825 per person. (*Id.*) In addition, claimants in *Doan v. Watson*, *supra*, received payments of $1,000, as did the claimants in *Kahler*.

Finally, in the case of *Dodge v. County of Orange*, 02 CV 769 (CM) (MDF) (S.D.N.Y.), the parties reached a strip search class settlement that provided for far less monetary relief, with more onerous prerequisites for class members receiving such relief, than what the class would receive in this case. In *Dodge*, the class, which consisted of up to 19,280 individuals (*Dodge v. County of Orange,* 226 F.R.D. 177, 180 (S.D.N.Y. 2005)) shared a total of $624,800, (exhibit 11 to Rozger

affirmation, p. 13)[3], subject to the defendants' right to exclude class members from receiving a payment if such class members were alleged gang members; had ever been charged with escape; were the subject of a drugs or weapons charge; displayed "assaultive or dangerous" behavior; had a "prior or current contraband charge;" had activated the metal detector and were found to have contraband; or were charged with a violation of probation or parole. (*Id*., p. 5-6). Each class member charged with a misdemeanor, or less, would receive a maximum of $1,000 (*id*., p. 9), and that any remaining money in the fund would revert back to the defendants (*id.,* p. 14). That settlement was approved by the court. (Exhibit 12 to Rozger affirmation, docket entry # 112).

Here, the proposed class settlement gives class members the benefit of a significant amount of compensation without having to prove particular emotional distress or the particular circumstances of their search, and without the added obstacle of allowing Defendants a chance to disallow their claims. In addition, class members share in the entire portion of the settlement fund devoted to claims, without the prospect of any excess amount being returned to the Defendants at the close of the process. This simple structure allows for more of the settlement amount to be paid as claims, rather than taken up by administrative costs, and greatly reduces the incentive for the parties to engage in post-settlement litigation. Thus, all in all, the amount offered to class members pursuant to the settlement here is fair, and on par with other settlements in similar cases. Accordingly, at this stage of preliminary approval, there is clear evidence that the Settlement is within the range of possible approval and thus should be preliminarily approved.

C. THE COURT SHOULD DIRECT NOTICE TO THE CLASS

Under Fed. R. Civ. P. 23(e), class members are entitled to notice of any proposed settlement

[3]For their efforts, class counsel in *Dodge* received $600,000 in counsel fees pursuant to the settlement. *Id*., p. 15.

before it is finally approved by the Court. *Manual for Complex Litigation Third* (1995) §30.212. The Settlement Agreement proposes notice of the Settlement be provided to all class members and a mailing to the known address, as determined by the Schenectady County Jail's booking sheets and/or the records of the Schenectady County Department of Probation and the Department of Social Services. The settlement administrator will also make a follow-up mailing for any notice that is returned by utilizing national address and credit databases, and by publication in local newspapers.

Under Rule 23(e) and Constitutional notions of due process, adequate notice must be given to all potential class members to enable them to make an intelligent choice as to whether to opt-out of the class. The Supreme Court has held that Rule 23 and due process do not require delivery of actual notice to every class member. Rather "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In addition, "[i]t is well-settled that in the usual situation first class mail and publication fully satisfy the notice requirements of Fed. R. Civ. P. 23 and the due process clause." *Zimmer Paper Products Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3rd Cir. 1985); *see also Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 633 (N.D.N.Y. 1981) ("individual notice by first class mail, coupled with notice by publication satisfies the requirements of due process and Rule 23.") In this case, counsel for the Settlement Class has a last known address and date of birth, obtained from the Jail's booking sheets, for each Settlement Class member. If the mailing to the last known address is returned, the personal information on each class member will be used to obtain a new address, and another mailing will be sent. In addition, class counsel will also obtain corrected class member addresses from other Schenectady County databases. (Exhibit 1, p. 13-14). This procedure, combined with publication, fully satisfies the requirements of due process and Rule 23, and should be approved by the Court.

D. A FINAL FAIRNESS HEARING SHOULD BE SCHEDULED

The Court should schedule a final fairness hearing to obtain all required information to determine that class certification is proper and the settlement should be approved. *See Manual for Complex Litigation, Third* §30.44 (1995). The fairness hearing will provide a forum for proponents and opponents to explain, describe or challenge the terms and conditions of the class certification and settlement, including the fairness, adequacy and reasonableness of the settlement. Accordingly, plaintiffs request that the Court schedule the time, date, and place of the final fairness hearing.

V. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court enter an Order: (1) conditionally certifying a class action with respect to the claims against Defendants pursuant to Fed. R. Civ. P. 23(b)(3) for the purpose of effectuating a class action settlement of Plaintiff's strip search claims; (2) preliminarily approving a class settlement with Defendants; (3) directing notice to class members regarding the proposed Class Settlement; (4) scheduling a final approval hearing, and (5) entering the proposed Order for Preliminary Approval.

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Respectfully submitted,

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